

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF NEW MEXICO
3 JESSICA LOWTHER, et al.,
4 Plaintiffs,
5 vs. NO: 1:19-cv-01205-JB-SCY
6 COUNTY OF BERNALILLO, et al.,
7 Defendants.

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10 Transcript of Hearing Proceedings before The
11 Honorable James O. Browning, United States District
12 Judge, Albuquerque, Bernalillo County, New Mexico,
13 commencing on April 21, 2020.

14
15 For the Plaintiff (telephonically):

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1 THE COURT: All right. Good afternoon,
2 everyone. Appreciate everyone making themselves
3 available to me this afternoon. Court will call
4 Jessica Lowther, et al., versus Jacob Wootton, et
5 al., Civil Matter 19-civ-1205-JB/SCY.

6 If counsel will enter their appearances
7 for the Plaintiffs.

8 MS. HIGGINS: Good afternoon. Rachel
9 Higgins and Vince Ward on behalf of the guardian ad
10 litem for the minor children.

11 THE COURT: Ms. Higgins, Mr. Ward, good
12 afternoon to you.

13 For the Defendants?

14 MR. APODACA: Good afternoon. Frank
15 Apodaca and Brian Griesmeyer on behalf of the county
16 Defendants.

17 THE COURT: Mr. Apodaca, Mr. Griesmeyer,
18 good afternoon to you.

19 Anyone else need to enter an appearance?

20 MS. HIGGINS: This is Rachel Higgins. I'm
21 probably the only female attorney in the case. I
22 felt the need to identify myself. We could not hear
23 Mr. Apodaca and Mr. Griesmeyer through the phone.

24 THE COURT: If you make sure you talk into
25 a microphone. You don't have to stand for me.

1 You're welcome to stand. If you do, come up to the
2 podium or come up to a microphone. Just make sure
3 you speak. I think you'll be able to hear as long
4 as we require everybody in the courtroom to speak
5 into a mic.

6 If you can't hear, Ms. Higgins, tell me,
7 and we'll reposition.

8 MS. HIGGINS: Thank you, Your Honor.

9 THE COURT: It seems to me, and y'all
10 correct me if I'm wrong, we can take up the motion
11 to dismiss and the motion to remand together. They
12 raise similar issues, so if that's agreeable, I
13 would propose I start with you, Ms. Higgins, and let
14 you argue the motion to remand, and maybe we can
15 break this down and take some issues one at a time,
16 and we can go back and forth and take both these
17 motions together with issues.

18 I guess I'm inclined to think that the
19 Defendants are right here, that there was no proper
20 service on the Defendants, and therefore it doesn't
21 comply with the statute that this case was removed.
22 It seems to me that probably the court does have
23 jurisdiction over the case because we ignore the
24 representative's -- representative's citizenship and
25 look at the citizenship of the -- the wards

1 themselves or the guardians. I'm inclined to think
2 they're going to be right, and this case is going to
3 remain in federal court, and I'm going to have to
4 dismiss it, and we'll have to start from scratch.

5 I guess I'm a little -- the thing I pause
6 on, I think when I was in private practice, and I
7 agreed to accept service, that usually meant that we
8 didn't -- we didn't mess with service anymore. Just
9 send me the complaint, whatever I need, and we agree
10 on a deadline so I don't miss the answer deadline,
11 and we kept moving. It didn't mean I was going to
12 actually be served, but that's probably the way I
13 practiced, and unless that was clarified and made
14 clear, then acceptance of service meant -- means
15 what it says, and that is that you actually need to
16 get a process server and serve service on now the
17 new agent, which is an attorney that's agreed to
18 accept service.

19 So I probably would -- I'm not sure I
20 quite agree with the Defendants that when those
21 phrases are used they mean you actually have to get
22 a court reporter -- I mean a court process server,
23 but I think unless that's clarified that I have to
24 go with the -- with what those words mean, and I
25 think probably both from the statutory standpoint

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1 and from the actual words used that they meant they
2 would have to be served.

3 So with that, Ms. Higgins, let me let you
4 argue your motion to remand. Again, if we can take
5 these issues one at a time, that would be helpful
6 for me digesting the number of issues that are in
7 this -- in these motions.

8 Ms. Higgins.

9 MS. HIGGINS: Yes, Your Honor. Thank you.
10 I agree that you can likely dispense with those
11 motions, and we can discuss both of them at the same
12 time, because they really do enjoy a factual and
13 legal nexus, and one essentially depends on the
14 other.

15 I'll tell the court, frankly, I'm of two
16 minds. I'm, of course, prepared to argue the
17 motions that we filed and the responses that we
18 filed.

19 I always appreciate, Judge Browning, that
20 you tell the parties ahead of time what you're
21 inclined to do and give us a brief sketch of the
22 reasons why you're inclined to do it, and since
23 you've done that in this case -- and I'll circle
24 back to why I'm of two minds.

25 I think that it would save the court

1 certainly a lot of time, and possibly the parties
2 some additional time, though I know the court will
3 brief this matter in a formal written opinion and
4 order. Perhaps it makes the most sense, then, for
5 Plaintiffs to simply request that the case be
6 dismissed without prejudice, and we will start anew
7 in state court, and that way the court will not have
8 to do all of this work.

9 The reason why I say I'm of two minds,
10 Your Honor -- and I would guess the Defendants would
11 not oppose that since the relief they're asking for
12 is the case be dismissed. Certainly there's time
13 left on the statute for us to file this on
14 standalone claims on behalf of our client.

15 The reason I'm of two minds, Your Honor,
16 we would hate to go through that process only to be
17 in this court or in front of another judge on the
18 forum defendant rule again, so I'm somewhat inclined
19 to at least argue Plaintiffs' position on why the
20 forum defendant rule, regardless of Defendants'
21 position on service, should apply in this case and
22 why the court should remand the case.

23 So I don't know whether the court would
24 like to entertain that given that I have given a
25 preview of our position, which is that we'd like to

1 spare the court the work and the labor of the
2 opinion, just dismiss the case, and file anew
3 against the county under the proper name for the
4 county in state court.

5 So I'll look back to the court for -- for
6 your comments on that.

7 THE COURT: Well, I think that -- and I
8 haven't studied my prior work, but I think that the
9 Defendants referred to a case in which I had tipped
10 my hand. I think it was in dicta, but if I remember
11 that case, I wrote that dicta on purpose for a day
12 like this where people would know that I probably
13 sided with, I think is, the majority rule, and that
14 is the Congress -- the Congress trying to -- they
15 selected those words very carefully. Those are not
16 words that are just all over the federal rules or
17 the rules that apply to the court, and for me to
18 then carve out an exception from that language, I
19 think I indicated that I wasn't inclined to do that.

20 I know Judge Johnson has done that, but
21 Judge Johnson, I think it's fair to say, is a little
22 more hostile to remand -- or to removal than I have
23 been over the years, and he and I have talked about
24 some of my opinions, and he's said in the past
25 sometimes that, "If I had read your opinion before I

1 wrote my opinion, I might have come out the other
2 way."

3 So I think there has been a divergence,
4 but I think in this particular case I'd probably tip
5 my hand. I don't mind relooking at it and bringing
6 my opinion up to date and giving you opinion on
7 that, but I think that probably I'm going to fall in
8 line with the majority if that -- if I'm reading the
9 case law correctly, of saying that Congress put
10 those words in specifically, and for me to create an
11 exception would probably not be my style, and I
12 would probably say they apply.

13 I realize that clever defendants and
14 groups of defendants can manipulate that a little
15 bit, but as we all know, there's nothing that's
16 constitutionally required by the forum defendant
17 rule. That's a creation of Congress. As long as
18 you have complete diversity, you satisfy the
19 diversity statute, so it's just a way of keeping
20 more cases in state court, but it's not crucial to
21 jurisdiction, so Congress -- it's totally statutory,
22 removal and remand, and as long as I have
23 jurisdiction, the fact that a few more cases come up
24 here than maybe Congress intended, but that's hard
25 to say, I'm not sure I fall into that minority group

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1 that says they can read Congress' mind better than
2 the language that is there.

3 So I'm probably going to come out that
4 way, but I'm not averse to putting together an
5 opinion. I'm not averse to deciding these -- these
6 motions and the issues here. It's -- it's really
7 your call.

8 MS. HIGGINS: Well, I appreciate that,
9 Your Honor, and no one would ever accuse you of
10 being averse to doing the work and getting the
11 opinions out.

12 Again, since you're broadcasting what your
13 view is likely to be, in all candor, I want the
14 court to know that counsel, Mr. Ward and I, have
15 discussed whether it makes any sense to go through
16 all the motions if we can simply dismiss the case
17 without prejudice and refile our standalone state
18 court claim anew.

19 I think what the court is referring to, I
20 think, is the memorandum of opinion and order that
21 the court entered in the Hunt versus Waters case, I
22 think. Hunt and Bennett versus Waters, and that's a
23 pretty new -- a pretty new opinion and order by the
24 court from October of 2018.

25 And I guess what I'd like to do is just --

1 I don't think, Your Honor, that you did broadcast
2 what you would do under the facts of this case, and
3 I just want to raise that distinction to the court's
4 attention, because Lee versus -- Lee Hunt versus
5 Waters and every other case the Plaintiff has been
6 able to find on this subject, whether in and out of
7 jurisdiction, has involved nonforum defendants as
8 defendants removing.

9 This case is quite unique, which is why it
10 would be interesting to know how you would land,
11 because there are no -- there are no nonforum
12 defendants, and there never will be. There never
13 will be.

14 I think the question we would ask the
15 court to think about and resolve, and I don't think
16 that you answered that in the Bennett case, I think
17 that question really is, does the forum defendant
18 rule really exist for the purposes in which it's
19 being used in this case whether a forum defendant,
20 Mr. Wootton, who has been served, certainly
21 subsequent to the filing of the notice of removal if
22 not prior to the notice of the filing of removal, is
23 it really appropriate for a forum defendant to
24 remove a case when there are only going to be forum
25 defendants and there are always only going to be

1 forum defendants.

2 I just know of no case or can't find any
3 case that finds the proposition that a forum
4 defendant can remove a case to federal court when it
5 only involves forum defendants.

6 I agree with you, Judge Browning, what's
7 before you, the decision you have to make, is not
8 just whether there's a strict construction but
9 whether the -- whether allowing a forum defendant in
10 a case like this to remove fulfills Congress'
11 intention to essentially utilize snap removal in a
12 case where both defendants are forum defendants and
13 the purpose of the statute was to protect nonforum
14 defendants of being subject to the prejudice of the
15 forum. Those are kind of the broad strokes of
16 Plaintiffs' argument.

17 Clearly the requirement that Congress --
18 the requirement that Congress imposed was for the
19 purpose of intending -- the purpose of preventing
20 plaintiffs from tactically blocking removal by
21 joining a forum defendant who's a sham defendant
22 without ever having an intention of serving that
23 defendant or litigating against it. Certainly
24 that's not -- no one's raising that argument in this
25 case. Of course they can't, because both defendants

1 are forum defendants.

2 I think that the reason -- the reasons
3 behind the removal statute are not fulfilled by this
4 court if the court applies the forum defendant rule.
5 In fact, what's really happening is gamesmanship is
6 being allowed on the part of forum defendants.

7 I think that Judge Johnson certainly
8 outlined this and his reasoning therefore in the
9 Santa Fe coal case, which you're aware of and you
10 clearly discussed with Judge Johnson.

11 THE COURT: I didn't discuss this case
12 with him.

13 MS. HIGGINS: I understand. I meant the
14 Santa Fe Coal case.

15 THE COURT: It wasn't this issue. I can't
16 remember the issue. There was another one we had
17 split on. I think it was one of the ones that
18 Congress has now come in and clarified. I can't
19 remember exactly the issue, but they made some
20 amendments to these removal and remand. It was one
21 we split on. I think they came out -- Congress
22 resolved it the way that -- that I had, and, you
23 know, there's been a trend.

24 You know, Congress is slowly, in this
25 area, somewhat expanding our jurisdiction rather

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1 than making it harder to remove, and so it's -- it's
2 just tricky to get away from the language of the
3 statute and start trying to figure out congressional
4 intent, because, if anything, when they've had to go
5 in and weighed in and picking which side they're
6 going on in removal and remand, they've been opting
7 more times than not to expand the removal authority
8 rather than contract it and adopt a lot of these
9 district court opinions that find so many technical
10 ways to fault the removal.

11 But I did want to make it clear I don't
12 think this is -- that we discussed this issue at
13 all. If we did, it escapes my memory.

14 MS. HIGGINS: Well, your Honor, I took it
15 to mean you discussed his perspective as he set
16 forth in his opinion in the Santa Fe coal case.

17 THE COURT: No, it wasn't -- that's not my
18 memory. My memory was just in general there was
19 another removal issue where the district courts were
20 splitting. He went one way, I went another way, and
21 I think Congress ended up resolving it the way that
22 I and some other district courts had gone.

23 MS. HIGGINS: Well, on that note we know
24 Congress has not resolved this issue. However,
25 legislation to prevent the type of snap removal,

1 snap removal tactics that are being exercised in
2 this case, actually has been introduced this year,
3 so we'll see what happens.

4 THE COURT: Has that been introduced --

5 MS. HIGGINS: We certainly don't want to
6 wait for that.

7 THE COURT: Has that been introduced in
8 the house?

9 MS. HIGGINS: Yes, Your Honor.

10 THE COURT: I think that's the problem. A
11 lot of things are being introduced in the house
12 right now, but I'm just not sure they're going to go
13 anywhere with Senators Grassley and Lindsey Graham
14 in control of that.

15 MS. HIGGINS: That, we can agree.

16 THE COURT: Control of the senate
17 judiciary committee.

18 MS. HIGGINS: We agree. Your Honor, I
19 certainly understand that you're signaling, if you
20 haven't already, you would tend to side with the
21 narrow construction of the forum defendant rule as
22 opposed to what other judges -- other district court
23 judges within the Tenth Circuit states have done,
24 which is essentially to apply and -- a third result
25 type of analysis to the facts of whatever case is

1 before them on removal, and you know, the -- since
2 the requirement is intended for the plaintiffs from
3 these tactics, I think what those judges and those
4 opinions reflect is that it wouldn't make sense for
5 Congress to enact the properly joined insert
6 language to prevent gamesmanship on the part of the
7 plaintiff only to allow for a different type of
8 gamesmanship by the defendant, which is of course is
9 what Plaintiff is contending in this case.

10 And just to complete the record on the
11 forum defendant --

12 THE COURT: Can you tell me -- can you
13 tell me -- because I am interested in the issue, can
14 you tell me what Congress would have to write out to
15 help you out in this case? What would be the
16 language that they would have to put in a statute to
17 make it clear that these cases cannot be removed?

18 MS. HIGGINS: Well, I think that it
19 would -- I think the language that would make it
20 more clear is something along the lines of what, in
21 fact, has been introduced in the Removal
22 Jurisdiction Clarification Act, House Representative
23 Bill 5801, which is essentially that if a case is
24 removed solely based on diversity jurisdiction like
25 here, and if at the time of the removal any party or

1 interest properly joined as a defendant is either a
2 forum defendant who has not yet been properly -- I
3 should say is a forum defendant and has not yet
4 properly served, to eliminate arguments on proper
5 service, then the action would still be subject to
6 remand so long as the forum defendant is properly
7 served under state law within 30 days after that. I
8 think what this is designed to eliminate is the race
9 to the courthouse to remove.

10 I still have to say, Your Honor, I don't
11 think any published case has contemplated what
12 Defendants have done in this case, which is a snap
13 removal of a case that doesn't involve any nonforum
14 defendants. And I -- I realize you spoke about this
15 not as a dispositive matter but as a matter of
16 professional practice when you were an attorney,
17 when you were a trial lawyer.

18 The Plaintiffs do contend, and we've
19 clearly waived the argument that the guardian ad
20 litem domicile here in New Mexico has any relevance.
21 She shares domicile with the minor children. We
22 agree with that.

23 And we've also waived, for the purpose of
24 not having to go through the tortured backdrop of
25 attempts to serve Mr. Wootton, any contention that

1 he was served at any point before counsel for
2 Mr. Wootton and the county agreed to accept service.
3 But we do -- we do think that when an attorney
4 accepts service on behalf of his clients in state
5 court, it is -- it is truly remarkable to later take
6 the position, when that counsel has received the
7 pleadings not once but twice, that service was not
8 complete for failure to file for acceptance of
9 service or something like that.

10 I recognize the court has to apply the
11 Rules of Civil Procedure and look at the federal
12 rules of diversity jurisdiction to -- to kind of
13 inform those facts, but Plaintiffs do not waive the
14 argument that there was service on the date that
15 counsel accepted service and was given the benefit
16 of the argument he requested, which was an extension
17 in the federal case.

18 So this case is unique on its facts, both
19 because there was an acceptance of service prior to
20 the notice of removal being filed and because the
21 Defendants involved in the case are forum
22 defendants, and there can never be a circumstance
23 where any Defendant in this case would require the
24 protection of the forum defendant rule.

25 So I've been talking for a long time, Your

1 Honor, probably in circles. You clearly, I'm sure,
2 have noticed that I've learned a lot since the
3 briefing was submitted on the issue. It's a very
4 interesting issue, and we're of the mind that the
5 Defendants are misusing the forum defendant rule in
6 this case to deprive Plaintiffs of our choice of
7 forum and venue in a state court case, basically on
8 the technicality of service.

9 If the court is so inclined, as the court
10 has already stated, we would prefer to simply
11 dismiss the case, without prejudice, to state court,
12 and we will start again.

13 THE COURT: Well, like you put it well in
14 the sense that that is an inclination, and I have
15 been known to go back to my chambers and start
16 writing an opinion and decide that it won't write,
17 and so that happens. So you are entitled to an
18 opinion. If you want to press the motion to remand,
19 I'll give you an opinion, and if you want to see if
20 the Defendants agree to a dismissal without
21 prejudice and we bring this case to an end and
22 everybody go do something else, that's fine as well,
23 but it's your call, Ms. Higgins.

24 MS. HIGGINS: Well, I would presume that
25 the Defendants would agree to a dismissal without

1 prejudice since that's what they've asked for, and
2 though I do have a terrible feeling in the pit of my
3 stomach that we may get removed on the same or a
4 different basis, I think it's -- I think I'm willing
5 to take that chance, because given the court's --
6 given the court's inclination and strict reading of
7 the forum defendant rule, if the court may -- is
8 consistent with that, really the only basis for
9 maintaining jurisdiction over the case is that
10 Plaintiffs failed to properly serve a local
11 Defendant before the case got to the court, and that
12 doesn't seem like a good enough reason for
13 Plaintiffs to be deprived of their choice of forum.

14 So long way of saying again, Your Honor,
15 I'm just so happy to be in court again.

16 THE COURT: You're not even here.

17 MS. HIGGINS: A long way of saying is
18 dismissal without prejudice is what we would opt for
19 judicial economy and to spare the possibility of
20 there ever being a written opinion on these tortured
21 service facts.

22 THE COURT: All right. Well, let's see
23 what the Defendants want to do. You got an offer on
24 the table. They'll just dismiss this case without
25 prejudice, and we'll see what happens. You want to

1 take the offer? You want the court to decide these
2 issues?

3 Mr. Apodaca?

4 MR. APODACA: Yes, Your Honor. Thank you.
5 Good afternoon. Good afternoon to counsel.

6 THE COURT: Mr. Apodaca.

7 MR. APODACA: Interesting offer for
8 certain. We do feel, as Ms. Higgins sort of started
9 the discussion with the sort of potential prediction
10 of the future if that were to happen, Defendants may
11 be monitoring the docket of the state courts to see
12 when this action would be filed again and prior to
13 service would be removing.

14 There's nothing that is different in that
15 circumstance except that it would present a cleaner
16 set of facts upon which to adjudicate these issues.
17 The position that -- that there is no longer -- you
18 know, if we go ahead with the inclination of the
19 court that the forum defendant applies here such
20 that the removal is proper and the remand motion is
21 going to be denied, it does not follow that there
22 needs to be -- there needs to be a dismissal as to
23 all Defendants in the case.

24 The response to the motion to dismiss by
25 Plaintiffs makes a big point of indicating that, you

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1 know, if the first effort at service didn't count,
2 and the second effort at service didn't count, we
3 have served them again to the best of our ability.

4 With respect to Mr. Wootton, he was
5 served, and an answer has been filed. If the remand
6 motion is denied, we believe that the court has
7 jurisdiction to proceed with the case as to
8 Defendant Wootton, and as is often the case with
9 respect to a misdesignation of Bernalillo County,
10 without taking notice of the 4-46-1 statutory
11 requirement that the county be sued through the
12 board, what usually happens is that there is a
13 dismissal with a -- an invitation to refile to
14 properly style the complaint so that the Board of
15 County Commissioners is named, as the statute
16 requires, and the case proceeds.

17 What else that -- from what I heard,
18 something else that's interesting is just this
19 general idea that there's a lot of gamesmanship with
20 response to invoking the forum defendant rule. The
21 court is reviewing the pleadings. Our view of the
22 global set of claims implicating Defendant Wootton,
23 being by Jessica Lowther, being raised by her
24 husband, being raised by her children, we don't
25 understand why this case exists.

1 During the pendency of a long existing
2 lawsuit during the pendency of the stay in the
3 lawsuit where there were requests for extensions to
4 respond to qualifying immunity motions, this case
5 was initiated. So there's a bigger picture with
6 respect to what's being done by both sides.

7 And, you know, every attorney, including
8 county Defendants, are entitled to seek refuge in
9 defenses available to them, procedural, factual, or
10 otherwise. That's what we've done. We don't look
11 past the Plaintiffs for doing the same thing. We
12 just think that bigger context matters with respect
13 to comments being made earlier.

14 So with respect to the offer, Your Honor,
15 respectfully we decline to accept it, and we would
16 be interested in seeing the court clarifying the
17 issues raised by the forum defendant rule, how it's
18 been interpreted as well as its application to these
19 facts.

20 A little difficulty that we had, Your
21 Honor, county defense counsel, is that I prepared,
22 because I authored the motion to dismiss, and
23 Mr. Griesmeyer was prepared to respond to the motion
24 to remand, so to the extent the court wants to get
25 into detail, I think Mr. Griesmeyer did want to

1 respond to a couple of representations made by
2 Plaintiffs' counsel concerning the state of the law
3 and whether other courts considered removal on
4 certain fact patterns with use of the forum
5 defendant rule, and we would respectfully ask
6 permission of the court to speak to those two
7 motions.

8 THE COURT: That's fine. As long as we
9 kind of -- it helps me to take these kind of motions
10 one bite at a time. I certainly don't mind
11 different counsel arguing.

12 I don't think you mind, do you,
13 Ms. Higgins?

14 MS. HIGGINS: I do not. You done.

15 THE COURT: Mr. Apodaca? You want to
16 turn it over to Mr. Griesmeyer?

17 MR. GRIESMEYER: Thank you, Your Honor.
18 The service issue I'm going to kind of skip over and
19 move into the forum defendant rule, and my reading
20 of that plain text, as the court recognized, this is
21 a procedural rule, not jurisdictional. This is part
22 of the procedure of removal, and really the main
23 thing I wanted to point out for the court --

24 THE COURT: If Congress could
25 constitutionally not have a forum defendant rule,

1 right?

2 MR. GRIESMEYER: Absolutely, Your Honor.

3 THE COURT: This is something that's been
4 around for a while. I think there was a day that
5 Congress wanted to limit the cases that were now
6 removed. We're now in a period of time where I
7 think Congress wants to have federal courts and
8 judges more involved in these cases, so it's -- it's
9 the ebb and flow of our judicial process. There's
10 nothing unhonorable about that. That's what makes
11 it a democracy, and this is one of the little areas
12 where it kind of plays out in our courts.

13 MR. GRIESMEYER: Absolutely, Your Honor.
14 So what I wanted to point out, I guess we could
15 start with the history of the forum defendant rule,
16 it really was an enactment in 1948 that put in the
17 properly joined and served language. Before that,
18 it didn't have the answer of language. In fact, it
19 didn't require service fees on any forum defendants
20 to prevent removal in the situation there are forum
21 defendants.

22 In 1948, that changed. The language
23 changed to require service of a forum defendant
24 before the rule could be applied. Specifically with
25 respect to the argument that the purpose of the

1 statute is to prevent fraudulent joinder by
2 plaintiffs, really that remedy was available to
3 plaintiffs prior to 1948. They could have moved to
4 remand a case or -- in other words, a case could
5 have been removed on the basis that a defendant was
6 fraudulently joined prior to 1948.

7 So this argument that that's Congress'
8 intent is not really clear based on that. I mean,
9 the fraudulent joinder defense was available before
10 for defendants. I mean, this language only appears
11 in one other place I've seen in the removal
12 statutes, and that is when it comes to requiring all
13 properly joined and served defendants to join in the
14 removal, and quite simply there, the courts have
15 explicitly held that if the defendant is not served,
16 they do not have to join at the time of removal. By
17 the same extension, this same phrase should be
18 applied just as strictly, the only other place that
19 I found it in the statutes, which is as part of the
20 forum defendant rule.

21 At this point, Your Honor, although there
22 is a recognized --

23 THE COURT: When did that language come
24 into the notice of removal? Wasn't that a rather
25 recent one? Didn't they split -- a circuit split on

1 that issue?

2 MR. GRIESMEYER: Your Honor, I don't know
3 for certain, but I have a feeling that was the split
4 resolved in 2011.

5 THE COURT: I think that's the one the
6 chief and I went in different directions, and
7 Congress came in and went the way I had gone, which
8 is that it had to be a defendant that had been
9 served.

10 MR. GRIESMEYER: Yes, Your Honor, and
11 really for that reason, too, it adds more credence
12 to the fact that Congress was specific in choosing
13 the properly joined and served language for the
14 forum defendant rule to not prevent removal where
15 there's unserved forum defendants. That's because
16 in 2011 they specifically amended that particular
17 part of the statute, section 1441(b)(2), but they
18 didn't change the properly joined and served
19 language. Certainly by 2011 there were already
20 splits among the district courts regarding the
21 interpretation of that.

22 And at this point, Your Honor, there
23 really is no split among the senior circuit courts
24 that have addressed this.

25 THE COURT: This is just a district court

1 split; isn't it?

2 MR. GRIESMEYER: Correct, Your Honor. For
3 all of the circuit courts that have addressed this,
4 they have all held the plain language controls, and
5 it's up to Congress to change that, and the results
6 are not absurd, and it's not contrary to the purpose
7 of the statute, whatever that purpose may have been,
8 that nobody's been able to quite put their finger on
9 because of the lack of legislative history on this
10 particular language.

11 Just to point out, we did, most recently,
12 of course, find that the Fifth Circuit has also
13 joined in this plain-language interpretation, but
14 more importantly, the Third Circuit and the Second
15 Circuit have both weighed in, and in those two
16 cases, which are in our notice of supplemental
17 authority that the Fifth Circuit cited to, Gibbons
18 v. Bristol-Myers Squibb Company, 919 F.3d. 699,
19 specifically on pages 704 to 707, that court
20 recognized the plain-language controls and allows a
21 forum defendant who has not been served to remove a
22 case.

23 This proposition that there is no case law
24 supporting what's been done in this case, is just
25 not true, and in fact, two circuits have held that

1 this exact set of facts is fine.

2 The other circuit is the Third Circuit in
3 the Encompass Insurance Company versus Stone Mansion
4 Restaurant Corporation, I think it's 902 F.3d. 147,
5 and specifically in that case the only defendant was
6 Stone Mansion, I think its restaurant, and that
7 non- -- that forum defendant removed prior to
8 service, and the facts of that case are surprisingly
9 similar too. I don't know if the court read those.

10 THE COURT: I read what you quoted out of
11 the briefing. I have not read the entire opinion.

12 MR. GRIESMEYER: That one is interesting
13 on the particular defense and how it comes up in the
14 grand scheme of things when there's issues with
15 service.

16 Prior to all three of these circuit
17 opinions, there's a Sixth Circuit in McCall v.
18 Scott, which we did cite, and there it's just a
19 footnote action, and it appears to be dicta. It's
20 not clean. It holds that the plain language holds
21 removal despite the inclusion of unserved forum
22 defendants.

23 As far as the circuits that weighed in,
24 they all hold the plain-language controls. Not only
25 that, we did have a lengthy stream cite that we

1 included in our response of many districts that also
2 have allowed this exact scenario, a forum defendant
3 who has not been served removing the case. And
4 that's the one that starts with the D.C. combined
5 through Cheatham case, and it's on -- let me find
6 the exact page on our brief, Your Honor. But it is
7 on -- starting on page seven at the top, and that's
8 the string citing every one of those cases, all
9 district cases aside from the McCall v. Scott case
10 from the Sixth Circuit, they're all districts that
11 have allowed this exact situation where a forum
12 defendant who has not been served removed the case.
13 And the district courts all held, obviously, the
14 plain language allows that, and to try and create
15 any other kind of exception to applying the plain
16 language just didn't quite make sense, especially in
17 light of Congress visiting this exact language in
18 2011 and choosing to leave it the same.

19 I think those are the main points that --

20 THE COURT: Seems like a long time ago. I
21 thought I wrote that opinion just recently. For you
22 to tell me it was 2011, boy, time moves on; doesn't
23 it?

24 MR. GRIESMEYER: Well, and -- so recently,
25 Your Honor, the case -- I think Plaintiffs' counsel

1 is correct, it's the Hunt v. Jack v. Waters case
2 that you authored, and that was just last year.

3 THE COURT: This issue, but that other
4 one, I remember it.

5 MR. GRIESMEYER: And of course, Your
6 Honor, our interpretation is that your reliance on
7 the Brazell Tenth Circuit opinion, although it was
8 just a memorandum opinion, and also just dicta, but
9 nonetheless, that court still did interpret at least
10 the first part of this phrase strictly holding that
11 it would not apply to forum defendant rule to
12 prevent removal where the forum defendant had not
13 been properly joined, so it's just a natural
14 extension to apply the same analysis to the "and
15 served" portion.

16 I think to the question as well, as far as
17 what Congress could do to help out or help change
18 this, I mean, they would just have to remove the
19 "and served" language. I mean, it would make that
20 language completely superfluous and meaningless to
21 hold any other way. So really it just seems like
22 they would have to remove it.

23 THE COURT: They go back to '48, 'right?

24 MR. GRIESMEYER: Correct. I think that's
25 really a lot of the statutory interpretation that we

1 found in our research. And, you know, to the point
2 I know Plaintiffs said we were critical of Judge
3 Johnson's opinion, I didn't mean to be critical. I
4 think probably that opinion didn't have the
5 opportunity or the benefit, essentially, of seeing
6 that several circuits weigh in interpreting the
7 plain language, and also that was a different sort
8 of case than this one as well.

9 So I don't know how much further or if
10 there's any other questions from the court on the
11 forum defendant rule. I do agree it would be
12 helpful to have some guidance on this particular
13 rule and how the district court sees it at this
14 time.

15 THE COURT: I don't mind writing an
16 opinion on it, but I guess I'm wondering, you know,
17 each chief judge, he's got an opinion out there.
18 You've kind of got mine, where you can tell where
19 I'm going. Does that give anybody any more
20 guidance? It might in my court, might in his court,
21 but is it going to give any more guidance in Judge
22 Herrera or Judge Parker's or Judge Riggs? I guess
23 maybe she'll have to choose, but, you know, I don't
24 mind doing my work.

25 So it's your call, but just -- it's just

1 my opinion out there, and I don't know if others
2 will go along with it or not. I certainly don't
3 speak for the entire court.

4 MR. GRIESMEYER: I understand, Your Honor.

5 MS. HIGGINS: This is Rachel Higgins.

6 THE COURT: Let me let Mr. Griesmeyer
7 finish.

8 MS. HIGGINS: Oh, I'm sorry. It's a
9 disadvantage not to be able to see.

10 THE COURT: Let me let the Defendants
11 finish. Anything else?

12 MR. GRIESMEYER: I think that addresses
13 most of the arguments that I felt were raised during
14 this oral argument, at least.

15 THE COURT: Let me ask both of you. I
16 don't know who's kind of covering this. You do
17 agree, though, that now you've accepted service for
18 Wootton, and he's properly served and in this case.
19 I see affirmative yeses?

20 MR. GRIESMEYER: Yes, Your Honor.

21 THE COURT: The third time was a charm.

22 MR. GRIESMEYER: He did file an answer
23 after the third attempt, correct, Your Honor.

24 THE COURT: He's in, and as far as you're
25 concerned, this case is properly here, and you're

1 ready to move forward, and you assume and I assume,
2 as well, the Plaintiffs can clear up the county
3 issue with filing an amended complaint that names
4 the Board of County Commissioners rather than the
5 county, and we're off and running, right?

6 MR. GRIESMEYER: Absolutely, Your Honor.

7 THE COURT: Anything else the Defendants
8 want to say, A, on the motion to remand or, B, their
9 motion to dismiss?

10 Mr. Apodaca?

11 Mr. Griesmeyer?

12 MR. GRIESMEYER: No, Your Honor.

13 MR. APODACA: No, Your Honor.

14 THE COURT: Ms. Higgins, if you want to
15 say any more on your motion to remand or anything in
16 response to the motion to dismiss.

17 MS. HIGGINS: Thank you, Your Honor, we
18 did file a notice of additional authority.

19 THE COURT: I have it in front of me.
20 It's -- I think you filed two -- no, the Defendants
21 filed one, and you filed one. Yours is document 30,
22 so I have it in front of me, Ms. Higgins.

23 MS. HIGGINS: Your Honor, I just wanted to
24 incorporate that into the record, and though, of
25 course, it's been filed, and bring the court's

1 attention to that opinion as yet another opinion
2 which, following Judge Johnson's lead, or at least
3 consistent with Judge Johnson in this opinion, which
4 cites to the Chevron Pipeline Company opinion out of
5 the District of Utah in 2019.

6 These cases consider whether reasonable
7 attempts to serve have any relevance to application
8 of the forum defendant rule. And the case that I
9 brought to the court's attention indicates that a
10 mechanical application of the plain language to
11 countenance and outcome that is directly at odds
12 with the purpose of the forum defendant rule will
13 not be applied.

14 So the case that I wanted the court to
15 look at that I filed today is essential. It bears a
16 lot in common with our case in that there were
17 attempts to serve. The court considered these
18 attempts to serve and determined that the forum
19 defendant rule should not be applied when reasonable
20 attempts to serve have been made. So I just wanted
21 to bring that to the court's attention. I think
22 that defendants have -- it's interesting that
23 they've declined to exercise the remedy that they
24 requested in their motion to dismiss.

25 And I'm quite certain this is the first

1 time I have ever argued on -- in favor of a
2 defendant's motion to dismiss and on behalf of the
3 plaintiffs, but over counsel's objections,
4 Plaintiffs would like to move forward with the
5 dismissal without prejudice. I think it's very
6 clear that the Plaintiffs have the right and the
7 ability to choose their own forum, particularly in a
8 case like this where we've brought only state law
9 claims under the State Claims Tort Act.

10 With all due respect to this court, whom I
11 have tried many a state and federal law in front of,
12 we filed this case in state law for a reason. That
13 is where we would like the case. If the court will
14 allow, we would like to file a motion to dismiss
15 without prejudice. That is where we think the case
16 is properly situated.

17 I guess we will have to wait and see
18 whether Defendants monitor the pleadings and effect
19 another snap removal. If they do, perhaps the
20 service issue will be cleaner the next time around.
21 That is what Plaintiffs would like to see happen
22 today. I can't think of any basis for the court to
23 deny Plaintiffs' request to file such a motion.

24 THE COURT: Well, I'll give you the last
25 word on your motion to dismiss. I guess they're

1 agreeing to your motion to dismiss, but that just
2 dismisses the -- the claims against the -- well,
3 does it -- would it dismiss both of them as written?
4 It now -- it would -- is it just dismiss it as to
5 the county?

6 MS. HIGGINS: Your Honor, I think there's
7 agreement that Defendant Wootton has been properly
8 served within the rules of federal civil procedure.
9 There's -- I think I can probably also say there's
10 agreement we did not caption the case Bernalillo
11 County Board of Commissioners or Board of
12 Commissioners of Bernalillo County. I think
13 Defendants' position is the case is only situated in
14 federal court as to Defendant Wootton for that
15 reason. The motion to dismiss would only be as to
16 Defendant Wootton since he's the only party properly
17 before the court.

18 I suppose we could move to dismiss on
19 behalf of both, but we'd create more material for
20 argument, and I don't think that's necessary in this
21 case.

22 THE COURT: Let me ask the Defendants this
23 question. Your motion to dismiss, it -- it still
24 was maintaining the position that -- that Wootton
25 had not been properly served, right, so that was

1 part of your motion to dismiss, was against both --
2 it was on behalf of both Defendants, right?

3 MR. APODACA: Your Honor, if you look at
4 the reply, we actually say that it will be up to the
5 court to determine whether the third effort at
6 service with respect to Wootton is effective.

7 THE COURT: You're conceding that now?

8 MR. APODACA: Right. So we've obviously
9 conceded, because we filed the answer. Your Honor,
10 I take the position that I would oppose any motion
11 to dismiss by the Plaintiffs, because it's just
12 another effort to sort of -- in our view, it's
13 difficult, because yes, they have a right,
14 certainly, to seek to split claims and split causes
15 of action on the same sorts of operative facts as
16 exist in Lowther one. That's what they did. So
17 we've availed ourselves to a procedural opportunity
18 to put it back in federal court. We think it's
19 appropriately here. We answered it. We believe it
20 should remain in federal court.

21 There was commentary on the notice of
22 supplemental authority and need to take stock of
23 reasonable attempts at service, you know, for the
24 reasons outlined in our motions to dismiss and
25 remand. We don't think the efforts were reasonable

1 at all under 1-004, which is the applicable rule
2 here, so to the extent that the effort at service
3 through the improper service packet is looked at, we
4 don't think it was reasonable.

5 This issue that speaks directly to my
6 decisions in this case as counsel for the county,
7 and my emails of November 27th, Your Honor, I would
8 only say if that email string is looked at, I had no
9 idea that -- I had no idea whether there was going
10 to be discovery as to Wootton or as to the county or
11 as to both. I even raised the question if there's
12 discovery as to Wootton, there's going to be a lot
13 that needs to be done. That's why we need more
14 time.

15 It would certainly never occur to me
16 service would be complete on the basis of something
17 that was given to me back before I represented these
18 Defendants in this case, and as it turned out, when
19 I did get that improper service package, there sure
20 was discovery to Wootton. It was my expectation
21 there would be something given to me that would
22 include the normal items of service required under
23 1-004 which would be the summons and complaint for
24 service upon an individual, and secondly, anything
25 else in addition to that, which would be something

1 that could be included, i.e. discovery, and which
2 actually was in the improper service packet. It was
3 fully my expectation that something would be sent to
4 me that would have whatever it was that the
5 Plaintiff intended to serve upon us. That never
6 happened.

7 So, you know, frankly, it could have been
8 the fact that in the exact same timeframe I was
9 having the same issue with another plaintiff's
10 attorney, and, you know, I've included that as an
11 exhibit in my reply, and it was my same expectation
12 here.

13 I can understand that Plaintiff thinks it
14 remarkable. From my perspective, it was pretty
15 unremarkable.

16 THE COURT: I guess I was surprised by it,
17 because I thought, typically when I was doing
18 defense work, and I said, well, I'll accept service,
19 usually I would also say when -- so that there was
20 no misunderstanding, I would say, "And let's agree
21 on a response date when I file an answer," and I was
22 always very clear, or otherwise respond, so I could
23 file motions to dismiss if I wanted to so that there
24 was real clarity.

25 I never -- I don't think I had an

1 expectation I was going to have a process server
2 show up at my law firm and formally serve me. I was
3 working out a response date. That's what surprised
4 me a little bit about the exchange.

5 MR. APODACA: Your Honor, and in my view I
6 wasn't -- I did not have that expectation. My
7 expectation was I would be provided whatever was
8 intended to be served upon me. If we look at the
9 reply brief on the motion to dismiss and Exhibit H,
10 you know what I cite is an email -- it was service
11 by email. It wasn't a process server. This is in a
12 separate case. It says, "Mr. Apodaca, attached is a
13 complaint. Thank you for agreeing to as much as.
14 The issued summonses are attached." There it was.

15 As of that date, I felt I was served in
16 that other case. In the current case before the
17 court, that would have sufficed, particularly with
18 respect to discovery, I don't see how I possibly
19 would have been served discovery that they did put
20 in the proper service packet that was mailed to me.
21 That's an issue never addressed by the Plaintiff in
22 this case when they're saying when you put together
23 the other emails before and after removal, one was
24 the complaint in October, one has the summons on
25 December 23rd. Well, that equals service.

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1 Well, where's the discovery? Did you
2 decide that sometime between when you mailed the
3 improper service packet to the county and then
4 wanted that November 27th exchange to equal service
5 that you were going to not serve discovery on
6 Mr. Wootton?

7 So, you know, I was never expecting a
8 process server to come to my office. I expected to
9 be mailed whatever was served on me.

10 THE COURT: Go ahead and address
11 Ms. Higgins' point. They're the Plaintiffs. They
12 probably have some mastery over their case. If they
13 file a motion to dismiss the case without prejudice,
14 really what ability do I have to not grant that
15 motion? What do I -- how do I say, I can't -- they
16 can't do that?

17 MR. APODACA: Your Honor, to be honest
18 with you, we thought about that question thinking --
19 thinking of it as being one of the harder questions
20 put to us today, because I think the answer is not a
21 lot. You know, they do have the right to not sue or
22 dismiss a case, and if they want to do that, they
23 could do that, and we'd be, as I said, in a
24 different situation on a different day, you know, if
25 things break our way or not, if things break their

1 way, in terms of honoring the docket and that sort
2 of thing.

3 THE COURT: Do you think they're going to
4 file another case, and you think you're going to be
5 on top of it, and this case is going to be back here
6 in the same posture in front of me or another
7 district judge?

8 MR. APODACA: It's possible. From our
9 view, there was nothing -- that might be something
10 that might be more akin to the cases we've discussed
11 in the remand briefing that are properly called snap
12 removal cases. In this case, there was no snap
13 removal. We waited until the eleventh hour before
14 we removed, because we always were expecting -- we
15 did the research. We believed that this move was
16 available and it could be obviated and sort of
17 removed from available options for litigation
18 anytime -- whenever they served us.

19 The email exchange was November 27th. We
20 didn't remove until December 23rd. You know, when
21 we did, they didn't take the position that 11/27 it
22 was served. No, "You mailed the improper service
23 packet." I think the posture could be cleaner in
24 round two, if there is a round two, but that's where
25 it is.

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1 THE COURT: All right. Thank you,
2 Mr. Apodaca.

3 Ms. Higgins, let me ask you, I didn't
4 quite understand why it is there is a -- it's a
5 state case, right? You've got a case in state court
6 that's -- raises some similar claims or similar
7 parties. Tell me about the other case.

8 MS. HIGGINS: Sure. Your Honor, the state
9 law case that we filed recently that's the subject
10 of the court's jurisdiction is on behalf of Jessica
11 Lowther, who is the spouse of Adam Lowther. They
12 are both the parents of AL and WL, both of whom are
13 minor children.

14 The federal court case concerns a number
15 of federal claims and some state claims both against
16 Bernalillo County, Board of County Commissioners,
17 i.e., the Bernalillo County Sheriff's Department
18 independent Defendants, and State of New Mexico
19 Children Youth & Families Department and individual
20 Defendants concerning what we contend was an illegal
21 detention and arrest, illegal entry into the
22 Lowthers' home. Both of those events happened on
23 August 30th, and a subsequent removal -- the
24 children were removed on that date. There was a
25 subsequent removal on September 7th.

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1 The case that you are presiding over today
2 concerns the arrest of Jessica Lowther, months
3 later, on November 7th by Jacob Wootton. CYFD is
4 not -- there are no claims asserted against CYFD in
5 the state court case. The state court case is
6 limited to 41-4-12 related claims concerning that
7 later arrest date. "I, Detective Wootton, of
8 Jessica Lowther," and essentially Plaintiffs' theory
9 is at this point in time Defendant Wootton knew or
10 should have known there was absolutely no probable
11 cause to suspect Ms. Lowther of any crimes and in
12 arresting her, he committed the acts of false
13 imprisonment and arrest and malicious abuse of
14 process under state law.

15 So just to summarize, some of the parties
16 are the same as the federal court case, which
17 counsel refers to as Lowther one. Not all of the
18 parties are the same, and the dates which relate to
19 the claims for the respective cases are different.

20 THE COURT: Okay. Well, okay.
21 Mr. Griesmeyer?

22 MR. GRIESMEYER: I'll respond briefly to
23 that. In the Lowther one case, they do bring
24 identical claims in the paragraphs 233 through 247
25 and also with regards to the children's claim at

1 paragraphs 255 through 261. So these are certainly
2 claims that could have been and should have been
3 included in the original case that also has claims
4 under 41-1-12.

5 THE COURT: Well, let me throw out a
6 proposal to you. Why don't I do this and see if
7 everybody -- why don't I go ahead and do my work.
8 I'll go ahead, and I think there was a -- some
9 half-interest on behalf of the Plaintiffs that I go
10 ahead and decide this issue. There's a full
11 interest by the Defendants that I decide this issue,
12 so I'll go ahead and decide the issue.

13 I think I'll probably come out that, you
14 know, I dismiss the county out without prejudice to
15 removal. I will -- without prejudice to amending
16 and bringing the county commissioners back in. I'll
17 leave Wootton in, most likely deny the motion to
18 remand, then if the Plaintiffs want to go ahead and
19 file today or down the road go ahead and file a
20 motion to dismiss, they can. If they want to
21 stick -- stay here, they can. Defendants can decide
22 what they want to do.

23 I'll -- if everybody wants, I'll go ahead
24 and have an initial scheduling conference, and the
25 nice thing about federal court for Plaintiffs is you

1 get going, and you get initial disclosures, and you
2 may want to take advantage of that while you're
3 here, get some discovery.

4 What do you think about that as a -- as a
5 way of proceeding from today, Ms. Higgins?

6 MS. HIGGINS: Well, Your Honor, I think
7 that you asked the question of defense counsel, what
8 is to stop you from granting our motion to dismiss
9 without prejudice. The answer they gave you was,
10 not much.

11 We are holding firm that that is what we
12 would like to do. We would like to file that
13 motion. We hesitate to have the court do all this
14 work if that is our plan, which it is. And my
15 concern -- you know, related concern about having
16 the court work on an order regarding the issues
17 raised and all the briefing that were we to -- were
18 the court not to entertain the motion to dismiss
19 without prejudice, we may run out of time to choose
20 our forum as we're entitled to do.

21 THE COURT: What kind of timeframe are you
22 looking at? You could give me a drop-dead time, and
23 I'll rearrange the work in my office to meet your
24 statute of limitation's time. What are you working
25 under?

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1 MS. HIGGINS: I am going to make sure I
2 don't get that date wrong, because that's the very
3 important date.

4 While I'm looking for it, Your Honor, I
5 can't leave uncorrected the statement that defense
6 counsel made. We have not contained the claims that
7 are before this court in the state law complaint and
8 what is referred to as Lowther one. There may be
9 facts that are identified, but certainly not counts.

10 All right. So -- to be safe, October 1st,
11 Your Honor. To be safe.

12 THE COURT: Okay.

13 MS. HIGGINS: The arrest date occurred in
14 mid-October.

15 THE COURT: Well, here's what I would
16 propose to do. If you get off the phone, and you
17 still want to dismiss this case, go ahead and file
18 your motion to dismiss.

19 If it's agreed to, Plaintiffs -- if the
20 Defendants agree to it, just submit me an order. If
21 it's contested, the Defendants can file their
22 response.

23 You call Ms. Wright when you file your
24 motion, and I'll set it for a hearing, and I'll try
25 to use that hearing to get my work done on these two

1 motions by that date, and that way it'll keep you
2 from having any statute of limitations problems.

3 MS. HIGGINS: Your Honor, I'm sorry. I
4 gave you the wrong date. The conduct -- the arrest
5 occurred in the first week of November, so I want to
6 pressure the court with an early October. The
7 arrest occurred early November. We would want to
8 get a ruling in October so we would not be deprived
9 of our choices.

10 THE COURT: You keep -- keep my feet to
11 the fire. Send me a letter, or call Ms. Wright.
12 I'll try to keep it -- keep your date in mind, and
13 I'll -- when I get your motion to dismiss, I'll try
14 to set a hearing on it, and then I'll try to have
15 these opinions ruled on by the time we have the
16 hearing, and if it's -- if you get back, and the
17 Defendants don't contest it, then y'all can just
18 submit me an order, and I'll -- I'll dismiss the
19 case without the opinions.

20 All right. Shall we go ahead and do the
21 initial scheduling conference so that we -- we get
22 the case going in case it stays here, Ms. Higgins?

23 MS. HIGGINS: That's fine, Your Honor,
24 however the court would like to proceed.

25 THE COURT: Does that work for the

1 Defendants?

2 MR. APODACA: Yes, Your Honor.

3 THE COURT: The parties didn't give dates
4 on their JSR. I drafted this for a request for a
5 180-day track, giving you six months to get
6 deadlines and around a trial I have in April of
7 2021, a big criminal case, and I have two smaller
8 cases, both civil cases, set around the same time,
9 and there's even a fourth case out there that --
10 that affects the timing on this one.

11 Does that work for you if I use that as a
12 basis here, 180-day discovery timeframe?

13 Ms. Higgins?

14 MS. HIGGINS: It does, Your Honor.

15 THE COURT: Does that work for the
16 Defendants?

17 MR. APODACA: Yes, sir.

18 THE COURT: So discovery will end by
19 October 19th, 2020. All discovery motions will be
20 due no later than November 9th, 2020. The Plaintiff
21 will identify -- the Plaintiffs will identify their
22 expert or experts by July 20th, 2020. When I say
23 identify your expert, that means produce -- identify
24 your expert or experts, produce your expert reports
25 and have your experts ready to be deposed. They

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1 don't have to be deposed that day, but have them
2 ready to go, because the Defendants are going to
3 have to do the same by August 19th, 2020.

4 All pretrial motions will be due no later
5 than December 10th, 2020.

6 Let me drop down and give you dates for
7 interaction with the court, and I'll come back to
8 the pretrial order. I'll set a hearing on all
9 pending motions for January 11th, 2021, at 8:30 a.m.
10 I propose to have a pretrial conference on
11 March 30th, 2021, at 8:30 a.m., and then I'll set
12 you for jury selection and jury trial on
13 August 12th, 2021, at 9:00 a.m.

14 The pretrial order will come from the
15 Plaintiff to the Defendants by the end of business
16 on March 19th, 2021, and the pretrial order will
17 come from the Defendants to the court by the end of
18 business on March 29th, 2021, and I'll look at it
19 overnight and be ready for our pretrial conference
20 the next day.

21 And y'all did -- now that I look at it,
22 the pretrial conference was in accordance with court
23 deadlines based on 180-day discovery track. So
24 that's where we got the 180-day track, so we must be
25 tracking together on this.

1 I am going to put you on a trailing
2 docket, but don't panic. I'll tell you how I run my
3 trailing dockets in a moment. You're on a trailing
4 docket for April 12th, 2021. You've asked for five
5 days, and so chances are that if you're ready to go,
6 I'll be ready to go too, depending on these other
7 cases I have that month.

8 If I were to give you a firm setting, it
9 wouldn't mean anything, and I hate to give you a
10 bunch of deadlines and expect you to comply with
11 them, and the one deadline I give myself I can't
12 comply with because of the crush in criminal cases.
13 In this district, I'm not able to give firm settings
14 this far out, but as a concession to the civil
15 lawyers, because I know how hard it is to work with
16 a trailing docket, as you get closer to that
17 April 12 date, and you need to get witnesses here
18 and subpoenas out, call Ms. Wright, and we'll work
19 with you to give a firm setting.

20 I can almost always try your case within
21 the month I give you a trailing docket, and chances
22 are I'll be able to give you April 12, but we'll
23 give you a firm setting.

24 Occasionally I'll get months like I did in
25 2018, where I had seven-week trials, and if you're

1 every day in trial, you just can't do all of them at
2 the same time. But chances are, if you're ready to
3 go, I'll be ready to go as well.

4 Do keep April 12 on your calendar, because
5 you may be asked to pick a jury with the criminal
6 folks that day. If you would prefer to pick your
7 jury the first day of trial, that's fine. We can
8 accommodate. And if you would prefer to pick it and
9 wait a little bit, that's fine as well. Some
10 lawyers like to do that. They get that half-day,
11 three-quarters of a day's worth of work out of the
12 way. They get the free voir dire from the criminal
13 folks. But it's up to y'all. If you can't agree,
14 call Ms. Wright, and I'll get on the phone and work
15 it out with you.

16 A few other requests you've made is that
17 the Plaintiff shall be allowed until May 1st, 2020,
18 to be able to amend the proceedings and adjoin
19 additional parties in compliance with the
20 requirements of Rule 15(a). This does not change
21 the substantive requirements of Rule 15(a), so if
22 you have an opportunity to do it as of right, you
23 need to do it by that date. And if you have to seek
24 leave by that day, it simply sets a deadline. It
25 doesn't change the substantive requirements.

1 The same for the Defendants. The
2 Defendants shall be allowed until June 1st, 2020, to
3 move to amend the pleadings and to join additional
4 parties and with compliance in Rule 15(a). It
5 doesn't change the substantive requirements. If you
6 have the ability to do it as of right, you need to
7 do it by that date, and if you need to seek leave of
8 the court, you need to seek leave by that date.
9 Simply sets a deadline for what is required or
10 allowed under Rule 15(a).

11 I will order that supplementation under
12 Rule 26(e) will be every 30 days. That's what the
13 parties propose, so I will so order it.

14 We talked about the pretrial conference.
15 It is based on the deadlines of a 180-day track.

16 Settlement conference, the court requested
17 that the -- the parties request that the court set
18 the settlement conference date. What I would
19 propose is that now that we have set deadlines for
20 this case, you tell me, as parties, when you think
21 it would be appropriate to have a settlement
22 conference, and then I will either go to Judge
23 Yarbrough and ask him to set that settlement
24 conference when you would like to have it, and if
25 you would prefer somebody besides Judge Yarbrough,

1 if you've gotten used to somebody else, I'd be glad
2 to run interference with you and make that happen.

3 If you need a private mediator, I can
4 assist in that area as well. You probably know the
5 private mediators as well or better than I do at
6 this stage of our careers.

7 Ms. Higgins, when do you think would be a
8 good time for a settlement conference?

9 MS. HIGGINS: I would like for the court
10 to consider scheduling that somewhere around the
11 expert disclosure deadlines for Plaintiff and
12 Defendant, and Judge Yarbrough is -- we would like
13 to have him.

14 THE COURT: Okay. So sometime after the
15 Defendants identify their experts and produce their
16 expert reports?

17 MS. HIGGINS: Yes, Your Honor.

18 THE COURT: What do the Defendants think?
19 Does that look about the right time to do it as
20 well?

21 MS. HIGGINS: I think that's reasonable,
22 Your Honor.

23 THE COURT: Okay. So unless y'all tell me
24 otherwise, I'll have Ms. Wright communicate that to
25 Judge Yarbrough and tell him that's when the parties

1 think that's the most opportune time for the
2 settlement conference to be, and if you decide you
3 want something else as far as a mediator or
4 magistrate, let me know, and I'll run interference,
5 but if not, I'll communicate that to Judge
6 Yarbrough.

7 How I do things on discovery, I find most
8 civil lawyers just need an answer. If you'd like to
9 take advantage of that, call Ms. Wright. And I'll
10 work it out. Most of the time I can give you pretty
11 quick answers. Sometimes I have to look at
12 something like an RFP or Interrogatory to make a
13 decision. It might take two or three days. Usually
14 I can give you answers right there on the phone or
15 pretty quickly.

16 If you would prefer to brief the
17 discovery, we will treat it like any other motions.
18 If you prefer that Judge Yarbrough do the discovery,
19 that's fine with me as well. I'm my own default, so
20 if I don't hear from you, I'll do my own discovery
21 unless I hear something.

22 On motions in federal court, you have an
23 obligation to meet and confer before you file
24 motions in the federal court. That's required by
25 the local rules as well as the federal Rules of

1 Civil Procedure. What I'm about to tell you is not
2 required, but I make myself available. If I step in
3 in the earlier stage, in the meet and confer, issues
4 sort of fall to the wayside, really focus on what
5 needs to be decided and what the judge needs to
6 decide in the case. If you'd like to take advantage
7 of that, call Ms. Wright, and I'll get on the phone
8 with you or meet you here in the courtroom or in
9 chambers, whatever works for you, and try to narrow
10 the issues down. I don't require that.

11 Federal court requires enough stuff, but
12 many districts are beginning to require these
13 prefiling conferences, and they're resolving 98 and
14 99 percent of all issues. If you'd like to take
15 advantage of it, don't hesitate to call Ms. Wright
16 and involve me in the process. Ms. Wright is good
17 at looking at the docket and seeing what's been
18 filed. It does help her.

19 These are deadlines. You can obviously
20 file motions in advance, to call, and we've talked
21 about one, call her and say this motion is about to
22 be filed, will you set it for a hearing, and I'll
23 try to read everything and be ready for the hearing
24 so that I can give you a ruling from the bench or at
25 least an inclination so that I can keep the case

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1 moving for you and keep it moving on my docket as
2 well.

3 I don't know your case well enough to know
4 whether you're going to have Daubert issues. If you
5 get in the case and think there's going to be
6 Daubert issues, if you agree in a motion, I can
7 almost always go along. If you get into the case
8 and have Daubert issues, and you can't agree on a
9 deadline, call Ms. Wright, and I'll get together
10 with you, because I do like to get Daubert issues
11 resolved before trial so that a little five-day
12 trial like this, we stay on track and don't have the
13 jury waiting while I'm trying to decide evidentiary
14 issues.

15 It looks to me like most everything
16 occurred here, so we'll plan on the trial being here
17 in this courtroom, and I will call a northern New
18 Mexico jury. That's everything basically above
19 Socorro, it's the biggest and most diverse of our
20 jury divisions, there being only two, so I won't be
21 calling a statewide venire unless y'all tell me
22 that's appropriate. We'll plan on the courtroom
23 being here, and the jury being a northern New Mexico
24 venire.

25 Ms. Wright, can you think of anything else

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1 we need to discuss?

2 I think that's all I need to discuss with
3 you. Is there anything else you would like to
4 discuss or I can help you with while we're together?

5 Ms. Higgins?

6 MS. HIGGINS: I don't think so, Your
7 Honor. Thank you.

8 THE COURT: Mr. Apodaca?

9 Mr. Griesmeyer?

10 MR. APODACA: No, Your Honor, got to
11 digest everything that happened. Right now we're
12 good.

13 THE COURT: All right. Well, I will try
14 to get you these opinions. It will probably be one
15 opinion with these two motions in it. Be a little
16 bit patient with me, because I do have a lot of
17 people that I'm kind of making some similar promises
18 to get some stuff out, and it's going to be a busy
19 spring and a busy summer, but if I'm causing any
20 problems, don't hesitate to call Ms. Wright and say,
21 "Look, he made this promise to us, and we need the
22 opinion," and I'll try to reorder my work, so I'll
23 try to get this done.

24 You know, these obviously are -- this is a
25 civil case, so if you y'all get into it and agree to

1 something else and move stuff around, I can almost
2 always go along. If you can't agree on something,
3 don't feel like you have to brief it up. Call
4 Ms. Wright, and I'll get on the phone with you and
5 try to work it out to litigate this case as
6 inexpensively and expeditiously as possible.

7 Appreciate your presentations this
8 afternoon. Y'all have a good afternoon.

9 MS. HIGGINS: Thank you, Your Honor.

10 MR. APODACA: Thank you, Your Honor. You
11 as well.

12 (The Court stood in recess at 2:53 p.m.)
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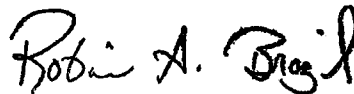
1 UNITED STATES OF AMERICA

2 STATE OF NEW MEXICO

3
4 C-E-R-T-I-F-I-C-A-T-E

5 I, Robin A. Brazil, CCR, RPR, Official Court
6 Reporter for the State of New Mexico, do hereby
7 certify that the foregoing pages constitute a true
8 transcript of proceedings had before the said Court,
9 held in the District of New Mexico, in the matter
10 therein stated.

11 In testimony whereof, I have hereunto set my
12 hand on this 5th day of May, 2020.

13
14
15 
16

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